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No. 705

In the Supreme Court of the United States

October Term, 1954.

WINNIE COLBERT, now BRIANS, *Petitioner,*

vs.

C. W. ROODHOUSE, *Respondent.*

RESPONSE OF C. W. ROODHOUSE TO PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

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April, 1955.

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IN THE SUPREME COURT OF THE UNITED STATES.
October Term, 1954.

No. 705

WINNIE COLBERT, now BRIANS, *Petitioner,*

vs.

C. W. ROODHOUSE, *Respondent.*

RESPONSE OF C. W. ROODHOUSE, RESPONDENT, TO PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Earl Warren, Chief Justice of the United States, and Associate Justices of the Supreme Court of the United States—

May It Please the Court:

The respondent, C. W. Roodhouse, herewith presents his response to the petition for writ of certiorari of Winnie Colbert, now Brians, filed in the above styled and numbered cause.

I.

Statement of Matter Involved.

The statement and brief of the petitioner includes matters not involved or presented for decision in the courts below and this statement of the case is offered by respondent for greater clarity in deciding the issue there determined.

References in this response to numbered pages of the record refer to the record as filed in the Supreme Court of Oklahoma.

This action was commenced in the District Court of Pontotoc County, Oklahoma, by Winnie Colbert as plaintiff against C. W. Roodhouse as defendant, on July 18, 1952. The parties occupy here the same relative positions as they did in the court below and will be hereafter referred to as plaintiff and defendant.

Plaintiff alleges in her petition that she is the owner in fee simple of the following described lands, situated in Pontotoc County, Oklahoma, to-wit:

> The South Half (S/2) of the Northwest Quarter (NW/4) of the Northeast Quarter (NE/4) of Section Twenty-eight (28), Township Two (2) North, Range Six (6) East,

that she acquired title thereto by virtue of allotment to her as one of seven-eighths degree of Indian blood and being enrolled as a citizen of the Chickasaw Nation enrolled opposite Roll Number 52 on the approved final roll of minor Chickasaws. Her patent is dated December 5, 1908, and appears as Exhibit "A" of her petition (R. 7).

Plaintiff further alleges in her petition that the defendant was and had been in possession of the lands for six years next preceding the filing of the action and during said time had used and occupied the lands and excluded plaintiff from the possession thereof (R. 1).

Plaintiff further alleges that defendant claims some right, title or interest in the lands by reason of a re-sale tax deed dated May 12, 1943, issued by the County Treasurer of Pontotoc County, Oklahoma, to the defendant as grantee; that said re-sale tax deed was filed for record in the office

of the County Clerk of Pontotoc County, Oklahoma, on the 12th day of May, 1943, and is recorded in Book 310 at page 331. That the re-sale of said lands for taxes and the deed so issued were and are void for the reason that the lands were exempt from taxation under the applicable laws of the United States (R. 2).

Plaintiff further alleges in her petition that she was allotted 100 acres of land as her homestead allotment, which tract does not include the lands in suit. That she was allotted 125 acres of land as her surplus allotment in which tract the lands in suit are included. That a tax exemption certificate covering One Hundred Sixty (160) acres of her allotted lands was issued to her dated May 28, 1929, approved by the Secretary of Interior, May 23, 1930, filed for record in the office of the County Clerk of Pontotoc County, Oklahoma, on June 26, 1930, and recorded in Book 132 at page 580, a copy of which is attached to the petition made a part thereof and marked "Exhibit C" (R. 9).

Plaintiff further alleges in her petition that the lands involved in this action were not described or included in said tax exemption certificate (R. 3).

Plaintiff further alleges that subsequent to this execution, approval and filing of said tax exemption certificate and on November 1, 1930, the Secretary of Interior entered his order removing restriction upon all of the surplus allotment of plaintiff effective simultaneously with the execution of a deed by plaintiff in compliance with the directions of the Secretary; that certain parts of her surplus allotment were sold by her to divers persons during the year 1931 with the approval of the Secretary, so that she remained the owner of only 125 acres of her original allotments, which 125 acres included the 20-acre tract in suit. That upon her sale

of a part of her tax-exempt lands it became the duty of the Superintendent of the Five Civilized Tribes to file a supplemental exemption certificate substituting the 20 acres involved here for the tax-exempt lands so sold (R. 4).

Plaintiff further alleges that the failure on her part to pay the taxes assessed against the lands in suit was occasioned by misinformation given by the County Treasurer to the Superintendent of the Five Civilized Tribes in that the Superintendent inquired of the Treasurer as to the amount of taxes due on the lands and the Treasurer failed to include in that amount the taxes assessed for the years 1939 and 1940 (R. 5).

Notice of the pendency of the action was issued by plaintiff's attorneys and served on the Superintendent (R. 31 and 32). Thereafter the United States filed its election not to remove the cause to the United States Court (R. 37 and 38). The United States filed no further pleading and did not thereafter appear in the action.

The defendant filed his demurrer which was overruled with exceptions allowed (R. 33 and 39). Answer was filed alleging that defendant was in possession of the property and pleading the Statute of Limitations (Subsections 3 and 6 of Section 93, Title 12, O. S. A.) as a bar to plaintiff's actions (R. 40). To this answer plaintiff filed her reply in form of a general denial (R. 41). The defendant filed his motion for judgment on the pleadings, (R. 42) and upon hearing thereon the trial court entered judgment for the defendant (R. 43).

The plaintiff appealed from that judgment to the Supreme Court of the State of Oklahoma. That court affirmed the judgment of the trial court in *Colbert* v. *Roodhouse*, 279 P. 2d 349 (not officially reported).

II.

Jurisdiction.

This Court has jurisdiction to review the decision of the Supreme Court of Oklahoma by certiorari. However, the decision is not one coming within either of the grounds enumerated in Rule 19, Section 1 (a). In our view a federal question of substance is not involved and the decision of the State Court is in accord with applicable decisions of the Federal Courts.

III.

Questions Presented.

We cannot agree that the question presented by the record is correctly stated in the petition. The question of whether or not the lands were taxable for the year 1930 is not presented by the record and was not before the trial court or the Supreme Court of Oklahoma for decision. It is clear from the record and from the opinion of the Supreme Court of Oklahoma that the questions considered and decided were: *First,* Was the 20-acre tract of land here involved subject to taxation for the years 1939, 1940 and 1942, and, *second,* Was petitioner's cause of action barred by subsections 3 and 6 of Section 93, Title 12, Oklahoma Statutes, 1951.

IV.
ARGUMENT.

1. The Decision Is Supportable as a Matter of State Law.

The decisions of the courts below rest upon the construction and application of a statute of the State of Oklahoma, namely, subsections 3 and 6 of Section 93, Title 12, Oklahoma Statutes, 1941, as amended by Session Laws of 1949, page 95, Section 1. The statute reads:

> "Actions for the recovery of real property, or for the determination of any adverse right or interest therein, can only be brought within the periods hereinafter prescribed, after the cause of action shall have accrued and at no other time thereafter;
>
> * * * * * * * *
>
> "(3) An action for the recovery of real property sold for taxes, within five (5) years after the date of the recording of the tax deed.
>
> * * * * * * * *
>
> "(6) Numbered paragraphs 1, 2, and 3, shall be fully operative regardless of whether the deed or judgment or the precedent action or proceeding upon which such deed or judgment is based is void or voidable in whole or in part, for any reason, jurisdictional or otherwise; provided that this paragraph shall not be applied so as to bar causes of action which have heretofore accrued, until the expiration of one (1) year from and after its effective date."

The Supreme Court of Oklahoma has construed and applied the statute in numerous cases in actions between citizens of Oklahoma not of Indian blood and not involving any question relating to Indian allotments. In those cases that Court has uniformly held the statute to be one of ad-

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verse possession. In order to be applicable the claimant must have occupied the land adversely for a period of five (5) years under a tax deed filed and recorded not less than five (5) years prior to the institution of a suit to recover by the ousted former owner. Both possession and recordation are necessary. The most recent decisions in point, none of which appear in the official reports at this time, are:

Sarkeys v. *Scott,* (1954) 269 P. 2d 779;
Williams v. *Bailey,* (1954) 268 P. 2d 868;
Boone v. *Claxton,* (1954) 269 P. 2d 980;
Stewart v. *Seigle,* (1954) 274 P. 2d 395; and
Sarkeys v. *Pate,* (1954) 274 P. 2d 539.

The effect of those decisions is that where a tax sale purchaser of lands has occupied the lands adversely to the former owner for a period of five (5) years under a tax deed recorded not less than five (5) years all prior to the commencement of an action to recover the lands, such action is barred by the quoted provisions of the statute although the tax sale was void for want of power or lack of jurisdiction in the tax sale authorities to make the sale.

The statutes of limitation of the State of Oklahoma relating to rights and causes of action for the recovery of lands or interests in lands were made applicable to restricted Indians of the Five Civilized Tribes "*to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma*" by Section 2, Act of April 12, 1926, 44 Stat. 239. The section is correctly set out at page 13 of the Petition for Writ of Certiorari filed herein.

It was not the intent of Congress that the statutes of limitation of the State of Oklahoma existing at the date of the approval of the Act should remain static. Otherwise those statutes would not apply equally to Indians and to

other citizens. It is well settled that subsequent amendments or changes in the statutes operating both retrospectively and prospectively apply with equal force to restricted Indians of the Five Civilized Tribes.

—*Wolfe* v. *Phillips,* (10 C. A., 1949) 172 F. 2d 481, 484, 486, cert. den. 336 U. S. 968, 61 S. Ct. 941, 93 L. ed. 1119;

Fife v. *Barnard,* (10 C. A., 1951) 186 F. 2d 655, 661, 662;

Bridges v. *Stick,* (U. S. D. C. E. D. Okla., 1952) 106 F. Supp. 506.

And this is true although the deed under which the adverse possession began was void.

—*Wolfe* v. *Phillips, supra.*

2. The decision is in accord with applicable Acts of Congress and the decisions of the Federal Courts construing them.

The applicable Acts of Congress are: Section 2, Act of April 12, 1926, 44 Stat. 239; Sec. 4, Act of May 10, 1928, 45 Stat. 495, as amended by Act of May 24, 1928, 45 Stat. 733; and Section 6 (b), Act of August 4, 1947, 61 Stat. 732. The Acts are correctly set out in the Petition for Writ of Certiorari filed herein at pages 11 to 13, inclusive.

The courts below in so far as the application of those Acts were relevant were controlled and guided by decisions of the Federal Courts construing and applying them. The decision here is in accord with those Federal decisions.

After the effective date of the Act of May 10, 1928, the petitioner designated 160 acres of her allotment as tax exempt; that designation was approved by the Secretary of the Interior and filed. The remainder of her allotted lands which included the twenty acres in suit became subject to

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taxation by the State of Oklahoma under the provisions of Section 4 of said Act.

—*United States* v. *Hester,* (10 C. A., 1943) 137 F. 2d 145, 147.

By that selection Petitioner exhausted her right under the Act by designating as tax exempt other land aggregating 160 acres, the land in suit could not be selected for that purpose and became subject to taxation after April 26, 1931.

—*United States* v. *Board of County Commissioners of McIntosh County, Oklahoma,* (10 C. A., 1946) 154 F. 2d 600, 605.

The Petitioner contended in the courts below and contends here that, upon a sale by her of a part of her allotment designated as tax exempt, she had the right to make a supplemental selection of tax-exempt lands so as to include the twenty acres in suit. She admits she did not attempt the exercise of any such right in her own behalf and now contends that it was the duty of the Superintendent of the Five Civilized Tribes to make the supplemental selection for her.

There is nothing in the Act of May 10, 1928, which requires the Superintendent to make any such supplemental selection in any case. The Act requires him to make a selection of tax-exempt land for an Indian if (*1*) the Indian has failed for two years from the effective date of the Act, that is, May 24, 1930, to make the selection for himself or (*2*) in cases where the Indian was a minor or legally incompetent. The petitioner had made her selection of the full 160 acres, that selection was approved and the certificate filed. The two-year period from the effective date of the Act expired May 24, 1930. The sales by the petitioner which she con-

tends entitled her to a supplemental selection took place on January 10, 1931 (20 acres), and on March 13, 1931 (80 acres).

In the event petitioner was entitled of right to file a supplemental certificate of tax exemption, it is admitted she made no attempt to do so. Where a right of tax exemption accrued under the Act of May 10, 1928, that right terminated on August 4, 1949, unless a certificate of tax exemption had been filed of record. Sec. 6 (b), Act of August 4, 1947, 61 Stat. 732, *supra.*

The contention so advanced by petitioner is not supported by any decision of this Court or of the Federal Courts below. It appears to be opposed to the Congressional intent as subsequently expressed in Section 6 (b) of the Act of August 4, 1947, 61 Stat. 732, *supra.* It is opposed to the decisions of the United States Court of Appeals for the Tenth Circuit hereinbefore cited, and of the United States District Court for the Eastern District of Oklahoma.

—*Bridges* v. *Stick, supra.*

3. A Federal Question of Substance Is Not Presented.

In so far as the decision of the Supreme Court of Oklahoma relates to the statutes of limitation of that state and the extinguishment of title by adverse possession under a tax deed, no Federal question is presented, and the jurisdictional requirements of Section 1257(3), Title 28, U. S. C. A., and of Rule 19 (a) are not fulfilled unless upon other grounds.

—*Poppe* v. *Langford,* (1882) 104 U. S. 770, 26 L. ed. 922.

The validity of the treaties and statutes of the United States has not been questioned by the courts below and is

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not here involved. It may be subject to some doubt whether a Federal question is presented by the record although the petitioner claims a right or privilege under the laws of the United States.

—*Cockran Oil & Development Co.* v. *Arnaudet,* (1905) 199 U. S. 182, 26 S. Ct. Rep. 41, 50 L. ed. 143;

Pittsburg & L. A. Iron Co. v. *Cleveland Iron Mining Co.,* (1900) 178 U. S. 270, 20 S. Ct. Rep. 931, 44 L. ed. 1065;

McStay v. *Friedman,* (1876) 92 U. S. 723, 23 L. ed. 767.

It will be noted that the decisions last cited were entered prior to the amendment of September 16, 1916, (C. 448, Section 2, 39 Stat. 726) to Section 237 of the Judicial Code (Section 1257, Title 28, U. S. C. A.).

With respect to petitioner's claim of tax exemption under the Federal Acts hereinabove mentioned, it does not appear to present a Federal question of substance.

The department of the Interior is charged with the duty of protecting and representing Indians of the Five Civilized Tribes in litigation involving their rights to lands allotted under the Acts of Congress and treaties with the Tribes. Observation suggests that the officers of the United States are diligent in the performance of that duty and they cannot successfully be charged with negligence in that respect. The *petitioner* caused notice of the pendency of this action to be served on the Superintendent of the Five Civilized Tribes in accordance with the provisions of Section 3 of the Act of April 12, 1926 (44 Stat. 239). (Appendix, page 15.) In response to that notice the United States appeared by the United States Attorney and filed its application for an extension of time to plead or remove the cause to the Federal District Court (R. 34). An extension of 60 days was

granted (R. 35). Thereafter, the United States filed its Election not to Remove and Withdrawal of Application for Extension of Time to Plead (R. 37). No further appearance was made by the United States in this case and in no manner did it present or support petitioner in her claim in this action. We are justified in assuming that the officers of the United States charged with the duty of protecting petitioner's rights under Federal law concluded that no Federal question of substance was involved or that petitioner's claim was without merit.

In *Wolfe* v. *Phillips, supra,* the United States filed its intervening complaint. Before that case was tried the United States withdrew its complaint in intervention and did not participate in the appeal which counsel for the Indian claimant took from the adverse judgment.

—*Wolfe* v. *Phillips,* 172 F. 2d 481, 482.

We think it may properly be assumed that the officers of the United States believed the judgment of the trial court in that case correctly stated the law.

In *Bridges* v. *Stick, supra,* the United States intervened after service of notice and presented the defense on behalf of the restricted Indian. No appeal was prosecuted from the adverse judgment. It has become final and we must assume the United States through its responsible officers acquiesced in the conclusions of law set out in the opinion of the District Court in that case.

In the 27 years since the passage of the Act of May 10, 1928, no other case is reported which presents circumstances of fact similar to the case at bar or in which like contentions of right are made. This case involves an isolated and unusual set of circumstances. In view of the lapse of time since the enactment of the Act of May 10, 1928, and

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the provisions of Section 6 (b) of the Act of August 4, 1947, *supra,* it seems a recurrence of these circumstances is impossible or, a least, highly improbable.

We respectfully suggest that neither the record filed herein nor the brief of the petitioner presents any special or important reasons for the grant of the writ. The circumstances of fact are so unique that the rights of the members of the Five Civilized Tribes are not generally or importantly affected.

The respondent earnestly submits that the petition for certiorari should be denied.

Respectfully submitted,

ALBERT W. TRICE,
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Of Counsel:
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Ada, Oklahoma.

April, 1955.

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APPENDIX.

Act of April 12, 1926, 44 Stat. 239.

Section 3. Any one or more of the parties to a suit in the United States courts in the State of Oklahoma or in the State courts of Oklahoma to which a restricted member of the Five Civilized Tribes in Oklahoma, or the restricted heirs or grantees of such Indian are parties, as plaintiff, defendant, or intervenor, and claiming or entitled to claim title to or an interest in lands allotted to a citizen of the Five Civilized Tribes or the proceeds, issues, rents, and profits derived from the same, may serve written notice of the pendency of such suit upon the Superintendent for the Five Civilized Tribes, and the United States may appear in said cause within twenty days thereafter, or within such extended time as the trial court in its discretion may permit, and after such appearance or the expiration of said twenty days or any extension thereof the proceedings and judgment in said cause shall bind the United States and the parties thereto to the same extent as though no Indian land or question were involved. Duplicate original of the notice shall be filed with the clerk of the court in which the action is pending and the notice shall be served on the Superintendent for the Five Civilized Tribes or, in case of his absence from his principal office, upon one of his assistants, and shall be served within ten days after the general appearance in the case of the party who causes the notice to be issued. The notice shall be accompanied by a certified copy of all pleadings on file in the suit at the time of the filing of the duplicate original notice with the clerk and shall be signed by the party to the action or his or her counsel of record and shall be served by the United States Marshal and due return of service made thereon, showing date of receipt and service of notice. If notice is not served within the time herein specified, or if return of service thereof be not made within the time allowed by law for the return

of service of summons, alias notices may be given until service and return of notice is had and in no event shall the United States be bound unless written notice is had as herein specified: Provided, That within twenty days after the service of such notice on the Superintendent for the Five Civilized Tribes or within such extended time as the trial court in its discretion may permit the United States may be, and hereby is, given the right to remove any such suit pending in a State court to the United States district court by filing in such suit in the State court a petition for the removal of such suit into the said United States district court, to be held in the district where such suit is pending, together with the certified copy of the pleadings in such suit served on the Superintendent for the Five Civilized Tribes as hereinbefore provided. It shall then be the duty of the State court to accept such petition and proceed no further in said suit. The said copy shall be entered in the said district court of the United States within twenty days after the filing of the petition for removal and the defendants and intervenors in said suit shall within twenty days thereafter plead, answer, or demur to the declaration or complaint in said cause, and the cause shall then proceed in the same manner as if had been originally commenced in said district court, and such court is hereby given jurisdiction to hear and determine said suit, and its judgment may be reviewed by certiorari, appeal, or writ of error in like manner as if the suit had been originally brought in said district court.